



**Nathan v Republic (Criminal Appeal E007 of 2020)  
[2022] KEHC 15531 (KLR) (4 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 15531 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL APPEAL E007 OF 2020**

**JN NJAGI, J**

**APRIL 4, 2022**

**BETWEEN**

**KENNEDY MAIRURA NATHAN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant was convicted of 9 counts as follows:

Count I- Forgery contrary to section 350 of the *Penal Code*. The particulars of the offence were that on unknown dates in the year 2012 in Masaba South sub-county within Kisii County jointly and with others not before court, forged a transfer of land form in respect of LR No Nyaribari Masaba/Bonyamasicho/1828 purporting it to have been signed by Joseph Birundu Omwebu.

Count II - Uttering a false document contrary to section 353 of the *Penal Code*. The particulars of the offence were that on unknown dates in the year 2012 in Masaba South sub county within Kisii County, jointly and with others not before court forged an undated application for consent of Land Consent Board in respect to LR No Nyaribari Masaba/Bonyamasicho/1828, purporting it to have been signed by Joseph Birundu Omwebu.

Count III - Forgery contrary to section 350 of the *Penal Code*. The particulars of the offence are that on unknown dates in the year 2012 in Masaba South sub-county within Kisii County jointly and with others not before this court, forged an undated application for consent of Land Control Board in respect of LR No Nyaribari Masaba/Bonyamasicho/1828, purporting it to have been signed by Joseph Birundu Omwebu.

Count IV- Uttering a false document contrary to section 353 of the *Penal Code*. The particulars of the offence were that on unknown dates in the year 2012 in Kisii Lands office within Kisii Count , jointly



and with others not before court, knowingly and fraudulently uttered a false application for consent of Land Control Board form to Kisii Land Registration office.

Count V- Forgery contrary to section 350 of the *Penal Code*. The particulars of the offence were that on or about the 16<sup>th</sup> day of September 2012 in Masaba South sub county within Kisii County jointly and with others not before court, forged a sale of land agreement dated September 16, 2012 in respect of LR No Nyaribari/Bonyamasicho/1672, purporting it to have been signed by Wycliffe Anyona.

Count VI- Forgery contrary to section 350 of the *Penal Code*. The particulars of the offence were that on or about the 9<sup>th</sup> day of December 2013 in Masaba South sub-county within Kisii County jointly and with others not before court, forged a sale of land agreement dated December 9, 2013 in respect of LR No Nyaribari Masaba/Bonyamasicho/1672, purporting it to have been signed by Wycliffe Anyona.

Count VII- Making a document without authority contrary to section 357(a) of the *Penal Code*. The particulars of the offence were that on or about the 28<sup>th</sup> day of November 2012 in Masaba South sub county within Kisii County jointly and with others not before court, with intent to defraud and without lawful excuse, make a letter of consent form serial number 583651 by inserting your names in the names of parties' column, purporting the same to have been made and executed by Masaba south sub-county Land Control Bard in your favour and in respect to LR No Nyaribari Masaba/Bonyamasicho/1828.

Count VIII - Uttering a false document contrary to section 353 of the *Penal Code*. The particulars of the offence were that on diverse dates between November 28, 2012 and December 13, 2012 in Masaba South sub county within Kisii County jointly and with others not before court, knowingly and fraudulently uttered a false form for a letter of consent form serial number 583651 to Land Registrar Kisii Lands Office, purporting the same to have been made and executed by Masaba South Sub county Land Control Board, in your favour and for the purpose of registration of land LR No Nyaribari Masaba/Bonyamasicho/1828.

Count IX- Making a document without authority contrary to section 357(a) of the *Penal Code*. The particulars of the offence were that on the December 13, 2012 in Masaba South Sub-County within Kisii county jointly with others not before court, with intent to defraud and without lawful excuse made a transfer of land form purporting the same to have been made and executed by Joseph Birundu Omwebu transferring a parcel of land LR No Nyaribari Masaba/Bonyamasicho/1828 into their names.

2. The appellant was sentenced to serve 2 years imprisonment on each of the counts. The sentence was ordered to run consecutively. The appellant was aggrieved by the conviction and the sentence and lodged the instant appeal.
3. The grounds of appeal are that:
  - a. The learned trial magistrate erred in fact and in law in convicting the appellant on count II, a charge of uttering a false document when the particulars of the charge did not make reference to whom the false document was uttered to, therefore failing to meet the elements and/or threshold to support the charge;
  - b. The learned trial magistrate erred in law and in fact in convicting the appellants on a defective charge as count III, V & VI were premised on section 350 of the *Penal Code* and the subject matter in the counts therein do not fall within the scope and definition of the cited provision of law;



- c. The learned trial magistrate erred in law and in fact in relying on the evidence of the document examiner and failing to make a finding and/or consider that no known specimen signature of Joseph Birundu Omwebu and Wycliffe Anyona was tendered to compare as against the questioned signatures in the agreement for sale dated September 19, 2012, agreement for sale dated December 9, 2013, application for consent of Land Control Board and land transfer form and the signatures submitted to the document examiner were taken while the case had already been reported to the police;
- d. The learned trial magistrate erred in law and in fact in failing to consider that no known signature of George Omwebu Morara was forwarded to the document examiner to compare against the agreements for sale dated September 16, 2012 and December 9, 2013 yet the said agreements were entered between the appellants and George Omwebu Morara;
- e. The learned trial magistrate erred in law and in fact in pronouncing that the application for consent of Land Control Board and the letter of consent were forged but failed to consider that no official from the Land control Board was summoned to authenticate and/or verify the contents of the said documents thus occasioning reasonable doubt;
- f. The learned trial magistrate erred in law and in fact in convicting the appellants on all counts of forgery but failed to consider the evidence of Wycliffe Anyona who admitted to signing the agreement for sale dated September 16, 2012 and the evidence of Stanley Gisemba who admitted that his office were the drafters of sale agreements in question thus casting reasonable doubt as to whether the sale agreements and the signatures therein were indeed forged;
- g. The learned trial magistrate erred in law and in fact in disregarding the evidence tendered by the appellants together with their witnesses;
- h. The learned trial magistrate erred in law and in fact in failing to make a finding that the offence of forgery, uttering a false document and making a document without authority were not proved at all as against the appellant and that the prosecution did not prove their case beyond reasonable doubt;
- i. The learned magistrate erred in law and in fact by convicting and sentencing the appellants on charges that were not proved to the required standards in law;
- j. The learned trial magistrate erred in law and in fact in shifting the burden of proof to the appellants while it is an established fact and practice that only in limited occasions will the burden of proof be shifted to the accused person;
- k. The learned trial magistrate erred in law and in fact by giving superficial or no consideration to the evidence tendered by the appellants while according undue and disproportionate weight and significance to the evidence adduced by the prosecution contrary to law;
- l. The learned trial magistrate erred in law and in fact in failing to find that there were reasonable doubts in the evidence tendered by the prosecution which doubts ought to have been resolved in favour of the appellants;
- m. The learned trial magistrate erred in law and in fact by sentencing the appellants harshly and excessively ignoring that the appellants are first time offenders.



## The Case for the Prosecution —

4. It was the case for the prosecution that the complainant in the case, one Joseph Birundu Omwebu was In the year 2012 the registered owner of land parcel No Nyaribari Masaba/Bonyamasicho/1792 that he was holding on his behalf and in trust of his brother, the late George Morara. That in 2012 and 2013 the late George Morara purportedly sold part of his share of the land to the appellant and his brother Samuel Nathan Mogaka vide two sale agreements dated September 16, 2012 and December 9, 2013. The first agreement was witnessed by one Wycliffe Anyona PW4. George Morara died in the year 2014. In 2018 the appellant and his brother went to occupy the land. Joseph Birundu PW 1 was apparently unaware that his brother had sold the land. He went to the Kisii Lands office and lodged a complaint. He found that land parcel No Nyaribari Masaba/Bonyamasicho/1792 had been subdivided into 3 portions — 1826, 1827 and 1828. There was a transfer of land document purporting that it was signed by him transferring land parcel 1828 to the appellant and his brother. He denied signing such a document. He reported to the police.
5. The matter was investigated by CI Caleb Mutonyi PW7 of Masaba South DCI Office. He went to Kisii Lands Office where he was given copies of documents relating to the transaction over the land. These were:
  - an application for consent of land control board requesting for subdivision of land parcel Nyaribari Masaba/Bonyamasicho/1792 into 3 portions;
  - transfer of land form signed by Joseph Birundu transferring land parcel Nyaribari Masaba/Bonyamasicho/1828 to the appellant and his brother;
  - letter of consent of Masaba Land Control Board authorising subdivision of land parcel Nyaribari Masaba/Bonyamasicho/1792 into 3 portions;
  - copy of mutation form of subdivision of I-R Nyaribari Masaba/Bonyamasicho/1792.
6. Joseph Birundu denied any dealings with the purported application for consent of the land control board and the transfer form. In the course of investigations, the investigating officer was handed over two sale agreements by the relatives of the appellant dated September 16, 2012 and December 9, 2013 whereby it was indicated that the appellant and his brother had bought parcels of land from George Morara Ornwebu from land parcels Nyaribari Masaba Bonyamasicho/1672 and 677 respectively. One Wycliffe Anyona PW4 was named as a witness to the agreements. The Investigating officer contacted the said person who denied to have witnessed the signing of the two agreements but contended to have witnessed a different agreement. He further found that the Masaba Land Control Board was not existent at the time that the consent is purported to have been obtained from the said board.
7. The investigating officer thereupon obtained specimen signatures of Wycliffe Anyona and Joseph Birundu. He forwarded them to the forensics laboratory, Nairobi. A forensic document examiner Benard Cheruyot examined the purported signature of Joseph Birundu on the transfer form and compared it with his specimen signatures and formed the opinion that the transfer form was not signed by Joseph Birundu. Another forensic examiner, Inspector Daniel Guto PW5, examined the purported signatures of Wycliffe Anyona on the sale agreements and compared them with his specimen signatures and formed the opinion that they were not signed by the said Wycliffe Anyona. The investigating officer charged the appellant and his brother with the offences as stated above. During the hearing Wycliffe Anyona said that he witnessed a land sale agreement between the late George Morara and the appellant but that the one he signed is not the one produced in court. He said that he did not witness any other agreement between the parties.



### **Case for the Defence -**

8. In his defence, the appellant, who was DW2 in the case stated in a sworn statement that he was informed by Wycliffe Anyona that George Morara was selling a parcel of land. He knew the said person as he was a member of his clan. He visited the land in the company of George Morara, Wycliffe Anyona, Joseph Birundu and Paul Omwebu. They agreed on a price of Ksh650,000/-. He informed his brother about the land. On the September 16, 2012 they went to an advocate called Gisemba for the drawing of the sale agreement. They made a down payment of Kshs 50,000/-. They later cleared the balance. George asked them to give him their identity cards, passport photos and copies of PIN for purposes of transfer. They gave him. In December 2012 they were presented with the title at Keroka. In 2018 a complaint was lodged. He denied forging the purported documents.
9. The appellant called 4 witnesses in the case. Stanley Gisemba, advocate, DWI testified that he was in the year 2012 practising at Keroka. That on September 16, 2012 the appellant went to his office with one George Morara. They requested him to draw a sale of land agreement for them. The seller was George Morara while the buyers were the appellant and Samuel Mogaka Nathan. The purchase price was Kshs 650,000/-. A sum of Kshs 50,000/- was paid and the rest was to be paid in instalments. A witness by name Wycliffe Anyona signed the agreement. That there was another witness by name of Paul Orengue who however did not sign the agreement. He did not witness any other agreement between the parties.
10. Samuel Mogaka DW3 testified that he is a brother to the appellant. That in September 2012 he was working in Kitui. That the appellant called him and informed him that there was a parcel of land on sale. That he travelled home. They went to an advocate called Gisemba. They paid Kshs 50,000/- and agreed on the mode of payment of the balance in instalments. They gave copies of their identity cards, PIN and passport photos to the seller for him do the other process. That later on his brother called him and told him that the title deed was ready. He and the appellant-went and paid George Morara the balance of Kshs 300, 000/-. George gave them the title deed. George was with Paul at the time. He denied forging the purported documents. He said that the only document he signed was the sale agreement.
11. Jared Omweri Nyandu DW4 told the court that he is a brother to Joseph and George. That he was not a witness to sale of land between George and the appellant. However, that he witnessed the appellant paying George Kshs 100,000/- over sale of land. He was with Paul when the money was paid. George was sick at the time and used the money for to go to hospital for treatment.
12. Charles Obina DW5 testified that he is a land surveyor and works with Black Bees Licensed Surveyors in Kisii. That one George Morara went to their office at Kisii in the company of one Joseph Birundu and said that he wanted his land surveyed. They paid a total sum of Kshs 28,000/- in instalments. They issued receipts in the name of George Morara. On October 9, 2012 he went to the land while accompanied by the said George Morara and Joseph Birundu. He too measurements. He thereafter prepared mutation. He was required to forward the forms to the lands office but he did not.

### **Appellant's Submissions**

13. The trial court convicted the appellant on the charges of forgery and making documents without authority on the basis that Joseph Birundu and Wycliffe Anyona denied ever signing the material documents, which evidence was supported by reports of forensics experts who discounted that the documents were signed by the said persons.
14. The advocates for the appellant, Musyoki Mogaka & Co Advocates, submitted the forensic expert who examined the documents did not testify in court. That instead it is a colleague, Chief Inspector Daniel



- Guto PW5, who testified on his behalf and produced the documents in court. That the said witness told the court that he could only answer questions in respect of the report that he had made personally. That the appellant did not have opportunity to question the expert who prepared the report on the questioned signatures. The appellant submits that this immensely affected his right to a fair hearing. He contends that the report was never availed to him well in advance so that he could adequately prepare himself beforehand.
15. The appellant further calls into question the credibility of the report and submits that no known signatures of the complainant were submitted to the forensics examiner together with the questioned documents. That this means that in conducting the examination, the document examiner based his findings on the specimen signatures vis a vis the questioned signatures. The appellant submits that this is not a fair way of going about the examination since at the time of taking specimen signatures, the complaint had already been lodged by the complainant against the appellant. The appellant states that nothing stops the complainant from deliberately altering the manner he signs in the specimen signatures collected.
  16. It was further submitted that for purposes of conducting forensic examination, the examiner is expected to collect enough specimens which should comprise of six sets specimen signatures each containing 36 specimen signatures. In the current case, the appellant submits that the forensic examiner only considered 4 incomplete sets of signatures.
  17. The appellant submits that although the document examiner is meant to guide the court in making its findings, the court is enjoined to make an independent decision and not to abdicate its duty to the document examiner. He relied on the case of *Samson Tela Akute vs Republic* (2006) eKLR to support his contention. It was submitted that the trial court did not venture into making its own findings. That it was prejudicial for the court to allow the experts' report when the findings were premised on a report that never made any reference to the known signatures of the complainant.
  18. On count 2 the appellant submits that there was no evidence of uttering the duly completed transfer instrument as alleged. He relies on section 353 of the *Penal Code* and the case of *Joseph Mukuba Kimani vs Republic* (1984) eKLR to support his case. The appellant further submits that the land registrar when testifying ought to have presented the presentation book, the land registration booking form or the title collection register to guide the trial court with precision on who presented the said transfer instrument. The appellant submits that the trial court shifted the burden of proof to him contrary to the law. The appellant further submits that the evidence of the Land Registrar PW6 did not carry any evidentiary value because he does not sit in the Land Control Board and is not involved in any issuance of letters of consent. It is the appellant's case that the prosecution ought to have had the Chairperson of the Land Control Board or a member of the board to testify in support of the allegations. Further, the appellant submits that the explanation by PW6 during cross examination that the documents for consent for the land control board sitting in Masaba North sub county could not be stamped by the District Commissioner Kisii Central are baseless.
  19. On count 4 relating to uttering a false application for consent of Land Control Board to the Kisii Land Registration Office and in count 8 relating to uttering a false letter of consent to Land Registrar Kisii Lands office, it was submitted that there was no evidence placed before the court to prove the person who lodged the documents with the Land Registry. It was submitted that all documents lodged together with the transfer are lodged together with an application for registration (booking form), which documents were not made available to the court.
  20. On count 5 submits that Wycliffe Anyona PW4 confirmed that the vendor and purchaser entered into an agreement for sale and purchase of land. Further that an Advocate of the High Court, DWI,



corroborated PW4's testimony as he prepared and witnessed the sale agreement. That the witness further testified that the vendor was present during the signing of the said agreement and witnessed the sale agreement. That PW4 confirms to have signed the agreement but states that the agreement produced in court is not the one he signed. The appellant further submits that the document examiner never considered the known signatures of PW4. That the evidence of PW4 shows that the appellant did not have the intent to defraud which is a component of the proof of the count of forgery.

21. On count 9, the appellant submits that there is no mention of the specific evidence pursuant to which the trial court based its conviction. The appellant reiterates that the trial court relied on the forensic report without considering the manner in which the report was placed before the court. The appellant further submits that the framing of the charge to have two distinctly separate charges from the same and or identical facts amounts to multiplicity thus prejudicing the rights of the appellant to a fair hearing. To support his contention, relies on [\*Archbold Criminal Law and Evidence\*](#) edn p13B.

### **Respondent's Submissions –**

22. The Principal Prosecution counsel, Mr Desmond Majale, submitted that the respondent had proved its case against the appellant beyond reasonable doubt. The respondent submits that it availed a forensic document examiner's report which indicated that the signatures on the documents did not belong to either Joseph Birundu or Wycliffe Anyona. As such, the appellant in uttering these documents to the lands fraudulently wanted the staff at the lands registry to be under the impression and belief that they were indeed signed by Joseph Birundu and Wycliffe Anyona. The respondent submits that the appellant acted fraudulently by uttering the forged documents and it is only safe to conclude that he was responsible for forging the said signatures. That the appellant in his defence never stated how he came into possession of the forged documents and in that light it is only safe to presume that he is responsible for the forgeries.
23. The respondent submits that all the key ingredients of the offence of uttering a false document as envisioned under section 357 of the [\*Penal Code\*](#) were proved. That it is clear that presented a forged document to the Land Control Board and to the Land Registry. Further, the appellant had within his knowledge that the documents in his possession were forged but nevertheless went ahead and presented them to the Land Control Board and the Lands Registry in order to affect a fraudulent transfer.
24. As regards the sentences, the respondent submits that the sentences meted out were well contemplated and were provided for by statute. The law as provided in sections 350, 353 and 357 of the [\*Penal Code\*](#) outlines 7 years as the punishment for the said offences. The respondent further submits that the appellant being convicted of all nine counts was therefore able to suffer the sentences contemplated upon conviction and the trial court dutifully sentenced the appellant accordingly.
25. The respondent further submits that the prosecution witnesses gave a consistent and corroborative account of circumstances of the case. That the cogent case put up by the prosecution was not rebutted by the defence of the appellant which consisted of mere denials. As such, the respondent prays that the appeal be dismissed and the court upholds the conviction and sentence.

### **Analysis and Determination —**

26. The grounds of appeal can be compressed into three main issues: -
  - a. Whether the prosecution proved its case beyond reasonable doubt;
  - b. Whether the appellant's defence was considered; and
  - c. Whether the sentence ought to run consecutively or concurrently.



27. This being a first appeal, this court is guided by the principles set out in the case of [David Njuguna Wairimu vs Republic](#) (2010) eKLR where the Court of Appeal stated that:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

28. Similarly, in the case of [Okeno vs Republic](#) [19721 EA 32 the Court of Appeal set out the duties of an appellate court as follows: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ([Pandya vs Republic](#) (1957) EA 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. ([Shantilal M Ruwala vs R](#) (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see [Peters vs Sunday Post](#) (1958) EA 424.” This was also set out in the case of [Kiilu & another vs Republic](#) (2005) KLR 174.”

29. The cardinal rule in criminal procedure on proof is that the burden is always on the prosecution to prove the elements of an offence which an accused is charged with. The standard of proof is always that of beyond reasonable doubt as was held in the case of [Woolington vs DPP](#) 1935 AC 462 that:

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the Prosecution to prove the prisoner’s guilt. Subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge is where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common Law of England and no attempt to whistle it down can be entertained.”

30. The appellant was facing three sets of offences - forgeries contrary to section 350 of the [Penal Code](#), making documents without authority contrary to section 357(a) of the [Penal Code](#) and uttering false documents contrary to section 353 of the [Penal Code](#).

31. The charges of forgery were counts 1, 3, 5 and 6. In count 1 the appellant was accused of forging a transfer of land form purporting the same to have been signed by Joseph Birundu Omwebu. In count 3 he was accused of forging an application for consent of land control board purporting it to have been signed by the above said person. In count 5 he was accused of forging a sale agreement dated September 16, 2012 purporting it to have been signed by Wycliffe Anyona. In count 6 he was accused of forging a sale agreement dated December 9, 2013 purporting the same to have been signed by Wycliffe Anyona.



32. Section 350 of the *Penal Code* provides that:

1. Any person who forges any will, document of title to land, judicial record, power of attorney, bank note, currency note, bill of exchange, promissory note or other negotiable instrument, policy of insurance, cheque or other authority for the payment of money by a person carrying on business as a banker, is liable to imprisonment for life, and the court may in addition order that any such document as aforesaid shall be forfeited.
2. In this section, "document of title to land" includes any deed, map, roll, register or instrument in writing being or containing evidence of the title, or any part of the title, to any land or to any interest in or arising out of any land, or any authenticated copy thereof."

33. Section 345 of the *Penal Code* defines forgery as "the making of a false document with intent to defraud or deceive."

34. The ingredients of the offence of forgery were stated by Lesiit J (as she then was) in the case of *Peter Wanjohi Gitonga v Republic* [2020] eKLR) where she cited the Court of Appeal decision in *Joseph Mukuha Kimani v Republic* (Criminal Appeal No 76 of 83) [1984] eKLR where it was stated that:

"The prosecution must prove that: -

- a. the document was false; in the sense that, it was forged
- b. the accused knew it was forged
- c. the utterer intended to defraud.

In the case of *Kilee v Republic* (1967) EA 713 at p 717, it was said that, the false document must tell a lie about itself and not about the maker. We think the position is better put, by stating that, the false document is forged if it is made to be used as genuine. To defraud is, by deceit, to induce a course of action: *Omar Bin Salem v R* [1950] 17 EACA 158, and to defraud, is not confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss, see *Samuels v Republic* [1968] 1."

35. Mativo J in *Caroline Wanjiku Ngugi v Republic* (2015) eKLR while relying on the Indian case of *Sukanti Choudbury vs State of Orisa* CRL REV No 1407 of 2008 held that the following ingredients are necessary for an offence of forgery to be proved:-

"Forgery is the false making or material alteration of a writing, where the writing has the apparent ability to defraud and is of apparent legal efficacy with the intent to defraud. Thus the elements of forgery are: -

- i. False making of — The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. "Writing" includes anything handwritten, type written, computer generated or engraved.
- ii. Material alteration — the person must have taken a genuine document and changed it in some significant way. It is meant to cover situations involving false signatures or improperly filling in blanks on a form or altering the genuine contents of the document.



- iii. Ability to defraud — The document or writing has to look genuine enough to qualify as having ability to mislead others to think its genuine.
  - iv. Legal efficacy — the document or writing has to have some legal significance.
  - v. Intent to defraud — the specific state of mind for forgery does not require intent to steal but only intent to fool people. The person must have intended that other people regard something false as genuine. A forgery may be committed either by handwriting through the use of type writer or a computer."
36. The charges of forgery in count 1 and 3 were based on the ground that the person who is purported to have signed the transfer form and the application for consent of the land control board, Joseph Birundu (PW 1), denied ever signing the documents. The charges over forgery of the sale agreements was based on the ground that one of the persons who was purported to have signed them, Wycliffe Anyona (PW4), denied having done so. The prosecution was required to prove in the first place that the documents were false in the sense that they were forged.
37. The prosecution relied on the reports of two forensic experts, Daniel Gutu (PW5) and Benard Cheruyot who examined the purported signatures of Joseph Birundu and Wycliffe Anyona on the respective documents and concluded that they were not the makers of the documents.
38. The appellant took issue with the findings of the two document examiners on the ground that the examination did not involve the known signatures of the purported signatories.
39. The way to treat the evidence of a handwriting expert was stated by Lord Heward in the case of *Republic vs Podmore* (1930) 46T LR 365 as cited in *Samson Tela Akute vs Republic* (2006) eKLR, that:
- “ ..... the evidence of handwriting experts is sometimes misunderstood. A handwriting expert is not a person who tells you, this is the handwriting of such and such a man. He is the person who habituated to the examination of handwriting, practised in the task of making minute examination of handwriting, directs the attention of others to things which he suggests are similarities. That and no more than that, is his legitimate province.....”
40. The evidence of a handwriting expert is opinion evidence and the court is at liberty to accept or reject it. In *Samson Tela Akute vs Republic (supra)* the court held that:
- "The evidence of an expert is a mere opinion which is not bidding on the trial court. The court has to make its own independent evaluation and finding, the opinion of the expert notwithstanding. The court has to examine the documents itself and come up to the conclusion with such assistance as can be furnished by the experts in the field, whether a particular writing is to be assigned to a particular person."
41. In *Dhalay v Republic* (1995-1998) 1 EA the Court of Appeal considered the position of expert evidence generally and held that:
- “ While courts were obliged to give proper respect to the opinions of experts, such opinions were not binding on the courts. Expert evidence had to be considered along with all other available evidence and, where there Was a proper and cogent basis for rejecting an expert opinion, a court was perfectly entitled to do so. A trial court had the duty of deciding whether or not it believed the expert and giving reasons for its decision.”



42. In the instant case the forensic experts examined the signatures of Joseph Birundu and Wycliffe Anyona without the advantage of their known signatures. In my view, it was of critical importance that known signatures of the two persons be availed. It was not sufficient for the forensic experts to compare the questioned signatures with the specimen signatures without comparison with the known signatures. It is a known fact that the signature of a person can change with time and that a person can have a varying version of the same signature. That is why it was important to include known signatures in the examination.

There was no explanation why known signatures of the purported signatories were not procured. I would say that the examination was incomplete in the absence of known signatures. I would agree with the submission by the advocates for the appellant that there was a possibility of the purported signatories altering the manner they signed when specimen signatures were being taken since the matter was under police investigation. My finding is therefore that the reports of the two handwriting experts were not credible for lack of known signatures of the purported signatories. There is no assurance in accepting the evidence of the two experts and the trial court, in my humble view, should have rejected the evidence.

43. I have at the same time examined the sale agreements dated September 16, 2012 and December 9, 2013. The sale agreement dated the September 16, 2012 was in respect of sale of land parcel No Nyaribari Masaba/Bonyamasicho/1672 whereas the agreement dated December 9, 2013 was in respect to sale of land parcel No Nyaribari Masaba/Bonyamasicho/677. The particulars of the charge against the appellant in count 5 was that he forged a sale agreement dated September 16, 2012 in respect of LR No Nyaribari Masaba/Bonyamasicho/1828 purporting it to have been signed by Wycliffe Anyona. Similarly, the particulars of the charge in count 6 were that the appellant forged a sale agreement dated December 9, 2013 in respect of No Nyaribari Masaba/Bonyamasicho/1828 purporting it to have been signed by Wycliffe Anyona. From the above, it is clear that the land parcels in the sale agreements are different from what the appellant was charged with forging. The Investigating officer did not explain why the appellant was charged with forging the agreements in relation to land parcel 1828 when the sale agreements themselves were categorical that the sale was over land parcels 1672 and 677. The particulars of the offences in counts 5 and 6 were contradictory and thereby did not disclose any offences.

44. In counts 7 and 9, the appellant was charged with making a document without authority contrary to section 357(a) of the [Penal Code](#). The section provides as follows:

- “ 357. Any person who, with intent to defraud or to deceive –
- a. without lawful authority or excuse makes, signs or executes for or—in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or
  - b. knowingly utters any document or electronic record or writing so made, signed or executed by another person, is guilty of a felony and is liable to imprisonment for seven years. ”

45. In [Joseph Muerithi Kanyita v Republic](#) [2017] eKLR the Court of Appeal set out the ingredients of the offence as follows:

“That offence is committed by the making, signing or executing a document, electronic record or writing, for or in the name of another person. In addition the making, signing or



execution must be without lawful authority or excuse, and with the intent to defraud or deceive.”

46. The particulars of the offence against the appellant in count 9 were that he with intent to defraud and without lawful excuse made a transfer of land form purporting the same to have been made and executed by Joseph Birundu Omwebu transferring land parcel No Nyaribari Masaba/Bonyamasicho/1828 into his name and that of his co-accused. I take the same position as in the charges of forgery in this count. There was no iota of evidence that it is the appellant who made the transfer form.
47. The particulars of the offence in count 7 were that the appellant and his co-accused with intent to defraud and without lawful excuse made a letter of consent form serial No 583651 by inserting their names in the parties’ column purporting the same to have been made and executed by Masaba Land Control Board in his favour in respect of land parcel No Nyaribari Masaba/Bonyamasicho/1828. I have examined the evidence in relation to this count. No examination was done on the hand writing on the letter of consent to determine whether it belonged to the appellant. The prosecution was required to lead evidence to show that the appellant is the one who wrote the document. Section 70 of the Evidence Act (cap 80 laws of Kenya), requires that where a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting alleged to be in that person’s hand writing must be proved to be in his hand writing. It was absurd for the prosecution to have accused the appellant of having written the document but made no attempt to ascertain whether the hand writing on the document was his. There was thereby no evidence that the appellant is the one who wrote the document.
48. Besides that, the document bore the stamp of “Kisii Central”, though the concerned board was the Masaba Land Control Board. No official from Masaba Land Control Board testified in the case to show that the document did not emanate from their office. There was no evidence placed before the trial court to prove that the said land control board did not exist at the time the transaction took place. There was thereby no evidence that the consent did not emanate from Masaba Land Control Board.
49. The appellant faced 3 counts of uttering a false document contrary to section 353 of the Penal Code — counts 2, 4 and 8. The particulars of the charge in count 2 were that the appellant and others forged an undated application for consent of Land Control Board in respect of land parcel No Nyaribari Masaba/Bonyamasicho/1828 purporting it to have been signed by Joseph Birundu Omwebu. I have examined the charge. Whereas the charge was uttering a false document, the particulars of the charge were in respect of forging an application for consent of Land Control Board form. There were no particulars on whom the document was uttered. The particulars of the charge were therefore at variance with the charge. The charge was thus defective and did not disclose any offence.
50. The particulars of the charge in count 4 were that the appellant knowingly and fraudulently uttered a false application for consent of Land Control Board to Kisii Land Registration office. The particulars of the charge in count 8 were that the appellant knowingly and fraudulently uttered a false letter of consent form serial No 583651 to Kisii Land Registry purporting the same to have been made and executed by Masaba South Sub-County Land Control Board.
51. Section 353 provides as follows:

“ Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.”



52. The word "utter" is defined under section 4 of the same Code as follows: -

“Utter means and includes using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal, or act upon the thing in question.”

53. The Court of Appeal in the case of *Kepha Moses Mogoi v Republic* [2014] eKLR considered what constitutes uttering a false document and said that: -

“The offence of uttering a false document under section 353 of the Penal code is proved if a person knowingly and fraudulently utters the document.”

54. In the instant case, there was no evidence as to the person who lodged the application for consent of land control board and the purported consent of Land Control Board with Kisii Land Registry. The witness who testified from the Lands office PW6 did not lead evidence on the person who lodged the documents with their office. There was then no evidence to prove that it is the appellant who uttered the documents with the land registry.

55. The appellant in his defence stated that it is George Morara who dealt with the rest of the process after they paid the money. The investigating officer did not investigate the role played by George Morara in the whole saga. If, as claimed by the complainant that George Morara did not inform him of the sale, there is a possibility that it is him, George Morara, who forged the documents so as to receive the balance of the sale price from the appellant. There was no evidence from the prosecution on the person who collected the title deed from the land registry. There is a possibility that it is George Morara who did so.

56. The fact of sale of a parcel of land by George Morara to the appellant was supported by even the prosecution’s own witness, Wycliffe Anyona PW4, who witnessed George Morara receiving part payment. This means that the late George Morara had an interest in the matter that could have prompted him to forge the documents so as to receive the balance of the money upon the process of registration being finalized. The fact that he never informed his brother, the complainant about the sale leads more weight on the suspicion that he could be the one who forged the documents. The investigating officer concluded that the sale agreements were forgeries yet he never conducted investigations to establish whether George Morara signed them. The mere fact that Wycliffe Anyona denied signing the agreement dated September 16, 2012 does not mean that George Morara also never signed it. It is clear to me that the trial magistrate dismissed the appellant’s defence without considering that there was high probability that it is George Morara who forged the documents. In face of the fact that the role of George Morara was not discounted in the whole process of procuring title, the conviction of the appellant was unsafe. The charges against the appellant were not proved beyond reasonable doubt.

57. The upshot is that there was no sufficient evidence to support the charges the appellant was convicted of. I do thereby quash the conviction on all the 9 counts, set aside the sentence imposed on the appellant and set him at liberty forthwith unless lawfully held.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF APRIL 2022.**

**J. N. NJAGI**

**JUDGE**

***In the presence of:***



Mr. Omayio for Appellant

Mr. Mr. Majale for Respondent

Appellant – Absent

Court Assistant:

14 days R/A.

